# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, owner and claimant of the Steamship VIRGINIAN,
**Appellant and Cross-Appellee.**

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a corporation,
**Appellee and Cross-Appellant.**

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AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, owner and claimant of the Steamship VIRGINIAN,
**Appellant and Cross-Appellee.**

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a corporation, as bailee of a cargo of lumber consisting of 3,563,011 feet, and for the use and benefit of the owners and insurers of said cargo,
**Appellee and Cross-Appellee.**

STRATHALBYN STEAMSHIP COMPANY, LTD., a corporation,
**Appellee and Cross-Appellant.**

In Admiralty

No. 2728.



# REPLY BRIEF OF CROSS-APPELLANT AND APPELLEE, STRATHALBYN STEAMSHIP COMPANY, LTD., TO BRIEF OF APPELLEE, STRATHALBYN STEAMSHIP COMPANY, LTD., AS BAILEE OF THE CARGO OF THE STRATHALBYN.

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As the cargo owner's brief was served but a few minutes before the argument, and request was made to the court for leave to file a reply brief thereto, the Strathalbyn Steamship Company, Ltd., as cross-

appellant, now submits the following in answer to the cargo owner's contentions:

For the purpose of avoiding the express provisions of the charter party between the American Trading Company and the owners of the Strathalbyn, the Strathalbyn Steamship Company, Ltd., as bailee of the cargo, on page 3, makes the following statement as the basis of its argument to secure relief from the express provisions of the charter party exempting the steamship from liability for loss by collision:

"The cargo owners were not parties to it."

A stipulation is on file in this case, dated October 28, 1915, between the cross-appellant and the appellee as bailee of the cargo, setting forth the charter party and the bill of lading. The bill of lading reads:

> "Shipped in good order and condition by the American Trading Company (Pacific Coast) on board the British steamer called the Strathalbyn," etc., "cargo to be delivered" * * * * ( * * "collisions excepted) to the order of the American Trading Company" * * * "they paying freight" * * * "and other conditions as per charter party."

As this brief is being written in Tacoma and the original stipulation and the bills of lading are on file in the court in San Francisco and we have not a copy of the bill of lading attached to the stipulation

above referred to, the above quotation is taken from a copy of the bill of lading furnished, shortly after the collision, by the American Trading Company, at the request of the Strathalbyn Steamship Company, Ltd. If there is any difference in the bill of lading on file and the copy we have quoted from, we make the above statement so that the court may understand the reason therefor, but we are as confident as we can be, without comparing the two bills of lading, that the above quotation is in accordance with the bill of lading attached to the stipulation above referred to. Note that in the bill of lading the American Trading Company is the consignor and in the charter party is the charterer.

The statement that "The cargo owners were not parties to it" (the charter party) is, therefore, inadvertently or inaccurately made, and, as all of the bailee's argument is hinged on the premise that the cargo owners were not parties to the charter party, and, as this premise is not in accordance with the facts, its argument is not pertinent to the facts involved in this case. The cargo owners are, therefore, not "innocent cargo owners," i. e., cargo owners disassociated from the terms of the charter party through the bills of lading. As the bill of lading refers to the charter party, and as the ship was a private carrier for the American Trading Company, and as the American Trading Company, the charterers, were the consignors and consignees

of the cargo, if there are any other persons owning this cargo, such cargo owners and their insurers succeeded only to the rights of the American Trading Company, and became a party to the exemption from loss by collision as fully as was the American Trading Company. As the bailee's whole argument is based on either the proposition that the cargo owners are innocent cargo owners—that is, not parties to the contract, through assignment or otherwise, exempting the Strathalbyn from liability by collision—or are protected as cargo owners by the Harter Act, and as it appears that the cargo owners were or are the American Trading Company, who entered into the contract of charter party and bill of lading, or its assigns, and as it appears that the ship was a private carrier and not subject to the terms of the Harter Act, the argument based on both these propositions and supported by the authorities referred to is entirely aside from the point at issue, which point of issue is that the company shipping the cargo was a party to the charter party and is, together with its successors by purchase under the bills of lading, therefore, bound by all its provisions, one of which exempts the Strathalbyn and owners from liability by reason of collision.

As the Strathalbyn is a private carrier and there is no objection to a private carrier exempting itself from liability for negligence, as was done in this case, then the contract relationship between the

parties should be enforced by the court, for it is a valid contract, and the court should see to it, in this consolidated cause, that the Strathalbyn has the benefit of the exemption, by only permitting such a decree to be entered as will prevent the Strathalbyn being required to pay any part of the loss to the cargo owner. Under the contract, the cargo owner chose to assume the risk of collision and apparently chose to protect itself from loss by reason of collision through insurance. The risk of collision assumed by the charterer and cargo owner entered into the consideration in fixing the freight rate prescribed in the charter, and the cargo owner should not now be allowed by any indirect method, or directly, to charge the Strathalbyn with any liability.

Under the law of Great Britain, in cases of collision for which both ships are in fault, the owners of cargo in one can recover only one-half their damages from the vessel colliding with the ship in which the cargo is being carried, and the right of the cargo owner to recover the other half of the damage is controlled by the charter party or bill of lading.

Carver, in his Carriage by Sea (5th Ed.) at page 922 *et seq.*, has the following:

> "704. Where both vessels have been in fault in bringing about the collision, the rule is that the liability of the stranger ship, or those responsible for her management, is for one-half

only of the damage occasioned to the goods. * * * And it is now clear that the fact that the collision was in part due to negligence of those in charge of the carrying ship does not stand in the way of a claim by the cargo owners against the other ship in fault. And at common law the right of the cargo owner would be to a full compensation. But by the rules of law administered in the Court of Admiralty, where both vessels are to blame, even though not in equal degrees, the whole loss sustained by their owners is apportioned equally between the two. Each party becomes liable to pay to the other one-half of the damage which he has sustained. And this rule has been extended to the claim of an owner of cargo in one of the vessels. He is allowed to claim for half his loss, and no more, against the other vessel. It is true, as I think, that the owner of the cargo is to be considered a perfectly innocent person, and that, as a plaintiff, he does not stand in the same position as the owner of one of two delinquent ships; and if that were the sole ground upon which the owner of the ship would only recover one-half, it might well be that the owner of the cargo would recover the whole; but this is not exactly the view taken by the admiralty law. It endeavors, whether wisely or not I do not say, to administer more equitable justice, and, where both parties are delinquent, to give a moiety of the loss, or to divide the whole loss, it being impossible to ascertain the proportionate culpability. I apprehend that, carrying out this principle according to its practice, the Court of Admiralty would say: 'You, the innocent owner of a cargo, proceeding against one only of two delinquent ships, shall recover only a moiety of the damage, because

we can affix to the vessel proceeded against only a moiety of the blame, and you shall be left, with respect to the other half of your loss, to your remedy against the other vessel, which we hold to be equally delinquent.' It may be true that this principle is not altogether reconcilable with the rules and practice of common law, and much might be said as to the equity of its operation and effect; but still I think that this resolution of the question is not conformable to the case of Hay v. Le Neve, and other cases; and therefore my decree must be that the plaintiffs do recover a moiety of the damage only. The Milan, 31 L. J. Adm. at page 112. By section 25, subsec. 9, of the Judicature Act, 1873, it is provided that, 'in any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.' "

We only ask that the exemption from collision liability provided for in the contract be given force and effect, and that in fixing the rights of the charterer-cargo-owner under the charter party the admiralty rule as above stated be applied to the private carrier contract and that the rule as established in connection with public carriers be not injected into this case to effectually overcome the express contract of the Strathalbyn's owners and the charterer-cargo-owner.

On page 8 of the cargo's brief is this statement:

> "If, therefore, the court should be of the opinion that the Virginian is not in fault, a decree, we submit, should be entered against the Strathalbyn awarding the cargo owners their full damages."

This position is inconceivable. The Strathalbyn Steamship Company, Ltd., as bailee, sued the Virginian, and has never commenced suit against the owners of, nor has it libeled, the Strathalbyn. It would be rather odd to have a judgment against the Strathalbyn in favor of a libelant against the Virginian. No process was issued against the Strathalbyn or her owners pursuant to any prayer of the bailee, nor, at all, except by reason of the petition of the Virginian under the 59th Admiralty Rule, for the purpose of protecting the Virginian against an excess liability in case the Virginian and Strathalbyn were held in mutual fault. In an ordinary case of mutual fault, where the cargo carrying vessel is a public carrier, one vessel could recover against the other one-half of the whole loss, but not so the Virginian in this case, in view of the provision of the charter party exempting the Strathalbyn, as a private carrier, from any loss by reason of collision. The situation, therefore, places the cargo owner in a position where it cannot recover anything against the Strathalbyn in a direct suit against the Strathalbyn, and surely, by reason of the petition of the Virginian, which is filed solely for the purpose of protecting the Virginian, the

cargo owner cannot have a judgment against the Strathalbyn for any amount. We, therefore, respectfully submit that, under the pleadings in this case, it would be absolutely impossible to hold the Strathalbyn, should the court conclude that the Virginian was not at fault.

The District Court was of the view that the Strathalbyn was not liable at all to the owner of the cargo on the Strathalbyn, but was obliged to recoup the Virginian for half its loss, and the decree is so framed that the cargo owner cannot recover against the Strathalbyn any sum whatever, for the cargo owner has not asked in its pleadings to recover against the Strathalbyn any sum whatever. From this decree the cargo owner has not appealed. How can it then claim it is entitled to judgment against the Strathalbyn if the Virginian is held free from fault? The District Court also took the position that, regardless of the cargo owner's contract exempting the Strathalbyn from liability, the Strathalbyn was nevertheless liable for one-half of the cargo damage by the indirect process of allowing the Virginian to recoup one-half of the total cargo damage. We say that justice to all can be done and the contract provisions between the Strathalbyn and the charterer cargo owner carried out by giving the cargo owner judgment against the Virginian for only one-half its damage, without any right in the Virginian to recoup.

The appellee, bailee of the cargo, contends that the Harter Act exempts the carrier from liability to the same extent that the charter party exempts the carrier from liability, but the courts have uniformly held that the Harter Act is only applicable as between the cargo owner and the carrying ship and does not extend to exempt from liability for occurrences beyond the express provisions of the Harter Act. This is a condition imposed by implication of law—not by contract. In other words, the Harter Act, as between a common carrier and the cargo owner, creates a contract or agreement which cannot be modified by the parties. On the other hand, there is no limitation upon the right of a private carrier to contract with a cargo owner. In this case, as in the case of The Maine, the contract is a private one, and, being pleaded as a defense to the petition of the Virginian impleading the Strathalbyn and being pleaded as a defense and served upon the bailee of the cargo pursuant to Rule 59, we contend that the court should give force and effect to the contract and only charge the Virginian, if both are at fault, with one-half of the loss of the cargo, and exempt the Strathalbyn entirely from loss, and thereby carry out the express intention of the parties, and, at the same time, do no damage to the Virginian by requiring it to pay more than one-half of the loss, provided the Virginian is not held solely at fault by this court for the collision. Of course, if it is held solely at fault by this court

for the collision, then there can be no attempt made on the part of the Virginian to make the Strathalbyn pay any part of a loss from which the Strathalbyn has expressly exempted itself by its contract.

We respectfully submit that the following points are clear:

(1) That the cargo owner is making no claim against the Strathalbyn for any loss in its pleadings or proof;

(2) That it is perfectly lawful for the cargo owner and the Strathalbyn, as private carriers, to contract so that the Strathalbyn is relieved from all liability for loss by reason of collision, whether occasioned by negligence or otherwise, as has been done in this case;

(3) That if the Virginian and Strathalbyn are finally held both at fault, the cargo owner will be entitled to recover but one-half of its loss against the Virginian, without the right on the part of the Virginian to recoup against the Strathalbyn any portion of that one-half of its loss;

(4) That the appellee is in no position to ask that the Strathalbyn be held for the cargo damage under any circumstances, as it has not appealed from the decree of the District Court, which did not make the Strathalbyn liable for any cargo damage;

(5) That the case of The Maine, 161 Fed. 401,

is directly in point and adjusts the liabilities according to the contract of private carriers and distinguishes the rights of private carriers under an exemption from that of public carriers under the Harter Act, and applies the rule that the cargo owner can recover but one-half its damage from the colliding vessel and nothing from the carrying vessel.

We, therefore, respectfully submit that the decree should be modified, if the Virginian and Strathalbyn are both held at fault, to the extent of permitting the cargo owner to recover but half its loss against the Virginian, to prohibit the Virginian from recouping any part of the amount it has to pay to the cargo owner and to exempt the Strathalbyn Steamship Company, Ltd., from any loss on account of the cargo.

Respectfully submitted,

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F. A. HUFFER,

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Tacoma, Washington.